NO. SC93047

IN THE SUPREME COURT OF MISSOURI

ROBERT BRIAN BONE,
Respondent,

v.

DIRECTOR OF REVENUE,
Appellant.

Appeal from the Circuit Court of Jefferson County
The Honorable Robert G. Wilkins

RESPONDENT'S BRIEF

ROBERT S. ADLER

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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

The Director of Revenue appeals the Circuit Court's decision that §§302.500 and 302.700 RSMo. are unconstitutional and that as a result the Director of Revenue is required to reinstate Respondent's driving privileges and remove the disqualification of his commercial driver's license.

On April 25, 2012, Robert Bone ("Respondent" "Bone") filed his Petition for Trial de Novo to Review License Revocation pursuant to §302.500 et seq RSMo. in the Circuit Court for Jefferson County, Missouri. (Legal File "LF" 4-7). Bone alleged, in relevant part, that §§302.505, 302.510,301.515. 302.520, 302.525, 302.530, 302.540 and 302.545, "are unconstitutional and violate the Missouri Constitution and the United States constitution in that they deprive Petitioner of property without due process of law, violate Petitioner's rights to due process of law and violate Petitioner's rights to notice and hearing." (LF 6). Thereafter on May 9, 2012, Bone filed his First Amended Petition restating the allegations of his Petition and adding Count II, "Petition for Review of CDL License Disqualification." (LF 8 -13). Bone alleged, in relevant part, that he was the holder of a Class A Commercial Driver's License and that the Director of Revenue ("DOR" "Appellant") was attempting to disqualify Bone's Commercial Driver's License ("CDL"). (LF 11). Bone alleged that the provision of §§302.700 and 302.755 RSMo were unconstitutional and violated his right to "equal protection and due process of law, as guaranteed him by Article I, Sections 2 and 10 of the Missouri Constitution under the

Fourteenth Amendment of the United States Constitution" for the reasons that: (1) there is no rational relationship between any legitimate government purpose and the law providing that the holder of a CDL shall suffer CDL disqualification for a Driving While Intoxicated in a non-commercial vehicle; and (2) Bone was not notified at the time of the request to submit to a chemical breath test that his CDL would be disqualified if he tested over the legal limit. (LF 11-12). Bone further requested that the Circuit Court declare §§302.700 and 302.755 RSMo. unconstitutional. (LF 12). The Appellant filed an Answer on May 18, 2012 denying generally the allegations in the Amended Petition. (LF 14-15).

On August 13, 2012 Circuit Court called the case for hearing. Evidence and argument concerning the Amended Petition was adduced. The DOR's only evidence was Exhibit A, a group exhibit containing Forms 2385, alcohol influence report pages 1-4, and a Missouri driving record. (Transcript "Tr." 3).

Bone presented the evidence and testimony of Mr. Travis Jones, a former police officer who previously held a "Type II" permit. (Tr. 22-24). Mr. Jones has a Masters in Science in Criminal Justice Administration and has taught drunk-driving courses and the Eastern Missouri Police Academy. (Tr. 25). Mr. Jones has also been trained as a National Highway Traffic Safety practitioner and an SFST instructor. (Tr. 25). Mr. Jones has received training through Indiana University School of Law and studied social statistics. (Tr. 38). Mr. Jones testified that he was familiar with the blood alcohol .08 "legal limit" and the .1 "legal limit." (Tr. 34). Mr. Jones testified that there was a study done that determined that a person with a blood alcohol of .15 was "impaired." (Tr. 34). Mr. Jones testified that Dr. Dubowski studied the difference between .10 and .14. (Tr.

37). Mr. Jones also testified that there was a national study done on the .05 limit, but none on the .08 limit. (Tr. 37). Mr. Jones stated that he had reviewed the literature within the preceding four weeks and again determined that there remained no national or Missouri study done to determine "impairment" for .08. (Tr. 35, 37).

Bone argued that the *Nat' Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct 2566 (2012) ("NFIB") decision held requiring a state to do something in order to receive federal funding was unconstitutional. (Tr. 14, 41). Bone further provided the Court with a printed copy of *NFIB* and argued that the regulations relating to commercial driver's license suspension for dwi in a non-commercial vehicle were adopted solely as a result of Missouri's attempt to obtain federal funding. (Tr. 14, 40). Bone stated, "Absent the requirement of federal funding, I don't think there's any doubt that the Missouri legislature would not have enacted that provision. Pilots can get DWI's in their cars and not lose their pilot's license." (Tr. 15). Bone contended that there was no rational relationship between "a person driving their own motor vehicle and their ability to operate a commercial driver's license (sic), that it's unconstitutional and invalid." (Tr. 41).

Bone similarly argued that under *NFIB* the Missouri statute lowering the legal limit from .10 to .08 was solely related to the attempt to get federal funding and was therefore also unconstitutional. (Tr. 15-16). Bone argued that driving while intoxicated requires impaired driving and that Missouri's enactment of the .08 limit was done only to

secure federal highway funds rather than reflecting impairment[1]. (Tr. 41). Bone provided the Code of Federal Regulations as Exhibit 4. (Tr. 40).

The Circuit Court held that .08 is the legal limit for alcohol impairment in Missouri and that the statute was constitutional. The Circuit Court further held that it was, "going to sustain the argument on the constitutional argument both as it applies to the .08 and to the suspension or revocation of the commercial driver's license as they relayed (sic) in this particular case." (Tr. 42).

The Circuit Court entered written Findings of Fact, Conclusions of Law and Judgment on October 22, 2012. The Circuit Court held, in pertinent part, that "Sections 302.500 and 302.700 RSMo are unconstitutional based on US Supreme Court decision in *National Federation of Independent Business v. Sebelius*, 11-393 U.S. 6-28-2011." (LF 16). The Circuit Court then ordered that the administrative suspension of Bone's driver's license should be removed and that all of his driving privileges, including his commercial driving privilege be reinstated. (LF 16).

This appeal follows.

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[1] See *State v. Schroeder*, 330 S.W.3d 468, 474 (Mo. banc 2011), *State v. Cox*, 478 S.W.2d 339 (Mo. 1972), *State v. Raines*, 62 S.W.2d 727 (Mo. 1933), and *State v. Hoy*, 219 S.W.3d 796 (Mo. App SD 2007) for examples of "impairment" and "intoxicated condition."

ARGUMENT[2]

I. (preservation of issue)

The Circuit Court did not err in entering its Judgment ordering the Director to reinstate Bone's driving privileges and finding that §302.500 and 302.700 RSMo. are unconstitutional in that the issue was timely presented before the Circuit Court.

The Department seemingly asserts in its first point that Bone failed to timely raise his claim that §§302.500 and 302.700 RSMo. are unconstitutional and that Bone failed to cite authority to support his claim. (Appellant's Brief ("App. Br.") 7-9). Appellant alleges

[2] Respondent contends that Appellant's Brief should be stricken and the appeal dismissed for failure to comply with Missouri Supreme Court Rules 81 and 84. Appellant's Brief fails to contain any statement of the standard of review for any point of Argument in violation of Missouri Supreme Court Rule 84.04(e). Additionally, Argument III fails to have a corresponding Point Relied On as required by Rule 84.04(d). Appellant also failed to timely file the Transcript on Appeal as required by Missouri Supreme Court Rule 81.19. Appellant filed the Transcript some 46 days *after* Appellant's Brief was filed. As a result, Appellant's Brief is devoid of any reference to the evidentiary hearing and places Respondent in the position of "responding" to arguments that will impermissibly be raised for the first time in the Reply. Respondent will nevertheless answer Appellant's claims should this Court decide not to strike the brief and to instead review Appellant's claims *ex gratia*.

that Bone's failure to raise the constitutional question "at the earliest opportunity" therefore "barred the circuit court from deciding as it did." (App. Br. 9).

Standard of Review

This Court reviews constitutional challenges to a statute de novo. *St. Louis County v. Prestige Travel Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011). "An act of the legislature carries a strong presumption of constitutionality". *Id.* quoting *Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006). "A statute is presumed valid and will not be held unconstitutional unless it contravenes a constitutional provision. *Id.* quoting *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). The burden of proof rests on the challenger to prove otherwise. *Id.*

A party challenging the constitutionality of a statute must: (1) raise the question at the first available opportunity (2) designate specifically the constitutional provision claimed to have been violated; (3) state facts showing the violation; and (4) preserve the question throughout appellate review. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

Discussion

Bone's Petition of April 25, 2012 stated, in relevant part that §§302.505, 302.510,301.515. 302.520, 302.525, 302.530, 302.540 and 302.545, "are unconstitutional and violate the Missouri Constitution and the United States constitution in that they deprive Petitioner of property without due process of law, violate Petitioner's rights to due process of law and violate Petitioner's rights to notice and hearing." (LF 6). Bone's Amended Petition of May 9, 2012 restated this language as well as stating that §§302.700

and 302.755 RSMo. were unconstitutional and violated his right to "equal protection and due process of law, as guaranteed him by Article I, Sections 2 and 10 of the Missouri Constitution under the Fourteenth Amendment of the United States Constitution" (LF 14-15).

National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566 (2012) ("NFIB") was decided on June 28, 2012. At the evidentiary hearing on August 13, 2012, Bone presented to the Circuit Court a copy of the *NFIB* case, a copy the Federal regulations, testimonial evidence, and extensive oral argument. (Tr. 14-16; 40-42). Appellant did not object at the hearing nor at any other time to "lack of notice" regarding the constitutional arguments or request additional time to respond. The Circuit Court fully considered the evidence, the argument and requested proposed Findings of Fact from both parties. The Circuit Court issued its Order declaring the statute unconstitutional on October 22, 2012, some two months after the evidentiary hearing. Appellant did not file any Motion for New Trial or Motion for Reconsideration. (LF 3).

Bone raised his *NFIB* constitutional argument as the earliest opportunity available to him after *NFIB* was decided. This is not a case where a constitutional claim was raised as an afterthought, in a post-trial motion or on appeal. See *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996). Instead, Bone squarely presented the issue to the Circuit Court via specific testimony from Mr. Jones regarding the difference between .08 and .10, citations and copies of *NFIB* and federal regulations. There is no requirement for Bone to have raised the *NFIB* issue in his Petition, some two months prior to the *NFIB* decision, in order for it to be reviewable by this Court. See *Appeal of MAC Sales Co. et al*, 356

S.W.2d 783,785 (Mo. 1953) noting that the court would have considered the issue properly raised had it been done orally, either before, during, or at the conclusion of the hearing.

Bone timely and properly raised the unconstitutionality of §§302.500 and 302.700 RSMo in his Petition, Amended Petition and at the evidentiary hearing. Bone referenced the unconstitutionality of the statues in his Petition and Amended Petition, citing specifically that they violated his rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 10 of the Missouri Constitution. (LF 6; 14-15). Bone timely raised the *NFIB* argument at the first available opportunity during the evidentiary hearing. The Circuit Court heard evidence and entered its Order accordingly. Appellant did not file a Motion for Rehearing or Reconsideration with the Circuit Court instead choosing to argue the issue before this Court. (LF 3).

As Bone timely placed the issue before the Circuit Court at his earliest available opportunity, this issue is properly before this Court for review and Appellant's first point should be denied.

II. (statutes are unconstitutional)

The Circuit Court did not err in declaring §§302.500 and 302.700 unconstitutional in light of *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) ("NFIB").

The Department's second point contends that the Circuit Court erred in finding §§302.500 and 302.700 RSMo. unconstitutional because the statutes were validly enacted by the Missouri General Assembly.

Standard of Review

This Court reviews constitutional challenges to a statute de novo. *St. Louis County v. Prestige Travel Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011). "An act of the legislature carries a strong presumption of constitutionality". *Id.* quoting *Ass'n of Club Executives v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006). "A statute is presumed valid and will not be held unconstitutional unless it contravenes a constitutional provision. *Id.* quoting *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). The burden of proof rests on the challenger to prove otherwise. *Id.*

Discussion

In *NFIB*, a plurality of justices found that the Medicaid expansion contained in the Patient Protection and Affordable Care Act (P.L. 111-148)("Act") violated U.S. Const., Art. I, §8, cl. 1, ("Spending Clause") by impermissibly coercing the states into accepting the terms of the Act. *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2642-60 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). This decision announced a new rule of law. Justices Ginsburg and Sotomayor noted in their dissent on this issue that, *"[F]or the first time ever*" the Court found "an exercise of Congress' spending power unconstitutionally coercive." *Id.* at 2630 (Ginsburg, J concurring in part, concurring in the judgment in part, and dissenting in part) (emphasis by Ginsburg, J).

Prior to *NFIB*, the law relating to the coercive nature of Congress' Spending Power had been governed by *South Dakota v. Dole*, 483 U.S. 203 (1987) In *Dole*, the Court considered whether the scope of the Spending power was exceeded by a statute permitting the Secretary of Transportation to withhold up to 5% of the federal transportation funds otherwise available to a state for any state that failed to set its minimum drinking age at twenty-one. *Id.* The Court found that Congress could attach conditions on the receipt of federal funds in furtherance of broad policy objectives as long as the condition was "unambiguous" and the states were able to make knowing choices with an awareness of the consequences. *Dole*, 483 U.S. at 207. Coercion, although mentioned, was not an essential element of the *Dole* opinion. *Dole*, 483 U.S. at 211. As a result, few cases relying on a theory of coercion were litigated at all: none successfully. See for example *Oklahoma v. Scweikder*, 655 F.2d 401 (DC Cir. 1981) and *West Virginia v. U.S. Dep't Health and Human Servs.*, 290 F.3d 281 (4th Cir 2002) . The U.S. Court of Appeals for the Eleventh Circuit noted in *Florida v. HHS*, 648 F.3d 1235 (11th Cir. 2011) that because the Supreme Court had failed to devise a precise test in *Dole* for "coercion" that many courts of appeals had held that "coercion" was not in any way a viable defense.

NFIB completely changed the landscape related to the unconstitutional coercion of the states by a Congressional spending measure. The plurality held that a state cannot be said to have acted voluntarily when Congress uses "financial inducements to exert a poker akin to undue influence." *NFIB*, 132 S.Ct. at 2602. Congress "may use its spending power to create incentives for States to act in accordance with federal policies

but when 'pressure turns into compulsion' the legislation runs contrary to our system of federalism" and therefore exceeds the scope of the Spending Clause. *Id.* The plurality further found that "individual liberty would suffer" in a "system that vests power in one central government" and that "political accountability" would suffer if voters do not understand which government officials to "blame" for a particular program. *Id.*

The *NFIB* plurality did not articulate a clear test for finding unconstitutional coercion. *Id.* at 2606. The dissent, supported by four justices, Scalia, Kennedy, Thomas and Alito, did find that the Medicaid expansion in the Act was coercive, in relevant part, because,

> "[f]or the average State, the annual federal Medicare subsidy is equal to more than one-fifth of the State's expenditures. A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health-care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes."

Id. at 2664.

The consequences for Missouri's failure to enact and comply with the federal Commercial Driver's License Program ("CDLP") are as follows: (1) following the first year of non-compliance Missouri would lose an amount equal to five percent of the Federal-aid highway funds apportioned under §104(b)(1), (b)(3) and (b)(4) as well as grant funds for the Motor Carrie Safety Assistance Program and Motor Carrier Safety Improvement Act; and (2) following the second and subsequent years of noncompliance

Missouri could lose an amount equal to ten percent of the five percent of the Federal-aid highway funds apportioned under §104(b)(1), (b)(3) and (b)(4) as well as grant funds for the Motor Carrie Safety Assistance Program and Motor Carrier Safety Improvement Act. 49 C.F.R. §384.401. In fiscal year 2012, Missouri received $1.024 billion in federal highway funds constituting 45% of its highway revenues. (http://www.modot.org/newsandinfo/documents/MeetMoDOT.pdf). Particularly in these times of constrained budgets, a loss of even a small percentage of the $1.024 B in federal highway funds would significantly impair Missouri's budget. The threatened loss of these funds is substantial and coercive under *NFIB* . The legislation that followed as a result of federal coercion, §§302.500 and 302.700 RSMo. are therefore unconstitutional as an improper exercise of federal authority under both the Spending Clause, U.S. Const., Art. I, §8, cl. 1, U.S. Const. Art. X and Mo. Const. Art. I. §1. See also *Printz v. United States*, 521 U.S. 898 (1997).

Appellant states that, "there was nothing before the circuit court to show that the General Assembly was motivated by the threat of losing highway funds – though that may have been the key to the legislative decision. (App. Br. 11). However, Appellant acknowledges in Argument III that in enacting the statutes the legislature acted "rationally" in complying with the federal law lest it lose its federal highway funding under 49 U.S.C. §31311(a)(10). (App. Br. 13).

Respondent contends that the Circuit Court had sufficient information before it to consider the constitutionality of the statutes prior to its ruling. The ruling was made after careful review of the evidence and relevant law. However, in the alternative this Court

may consider remand to the Circuit Court for additional findings of fact. See *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012).

III. (violation of Bone's rights)

The Circuit Court did not err in finding that §§302.500 and 302.700 RSMo violate Bone's rights to equal protection and due process as guaranteed by the Fifth and Fourteenth Amendments of the Missouri Constitution and Article I, Sections 2 and 10 of the Missouri Constitution.

The Department's third point contends that Bone's due process and equal protection rights are not violated by §§302.500 and 302.700 RSMo. because there is a "rational relationship" between the revocation of Bone's CDL for driving his personal vehicle while intoxicated.

Standard of Review

In a court-tried case, the judgment of the circuit court should be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Strup v. Director of Revenue*, 311 S.W.3d 793 (Mo. banc 2010) citing *Fick v. Dir. of Revenue*, 240 S.W.3d 688 (Mo. banc 2007). However, this Court will not affirm a circuit court judgment that erroneously declares or applies the law. *Id*. The laws enacted by the legislature and approved by the governor have a strong presumption of constitutionality. *Id.* citing *Jackson County Sports Complex Authority v. State*, 226 S.W.3d 156 (Mo. banc 2007). The burden of proof rests on the challenger to prove otherwise. *Id.*

Discussion

Due process applies to the suspension/revocation of driver's licenses by the state. *Strup v. Dir. of Revenue*, 311 S.W.3d 793, 796 (Mo. banc 2010). The United States and Missouri Constitutions require that due process of law be provided before an individual may be deprived of life or liberty. *State v. Pike*, 162 S.W.3d 464, 471 (Mo. banc 2005).

In equal protection analysis, the court first determines whether the challenged classification operates against a suspect class or impinges upon a fundamental right. *State v. Pike*, 162 S.W.3d at 470 citing *In re Marriage of Kohing*, 999 S.W.2d 228 (Mo. banc 1999). If the statute does not discriminate against a suspect class and does not implicate a fundamental right, then the rational basis test of review will be applied. *Id.* The rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest. To fail the rational basis test, the classification must have no reasonable basis and be purely arbitrary. *Pike*, 162 S.W.3d at 471 citing *Miss Kitty's Saloon, Inc. v. Missouri Dep't of Revenue*, 41 S.W. 3d 466, 467 (Mo. banc 2001). Under rational basis review, this Court will not substitute its judgment for that of legislature as to the wisdom, social desirability or economic policy underlying the statute. *Id.*

The enactment of §§302.500 and 302.700 RSMo was arbitrary and not rationally related to any governmental interest in that: (1) the reduction from .1 to .08 is not related to "impairment" and (2) other types of commercial drivers, such as pilots, are not precluded from operating vehicles despite an alcohol related contact in their personal vehicle.

Missouri courts have found that impairment is an element of driving while intoxicated. See *State v. Schroeder*, 330 S.W.3d 468, 474 (Mo. banc 2011), *State v. Cox*, 478 S.W.2d 339 (Mo. 1972), *State v. Raines*, 62 S.W.2d 727 (Mo. 1933), and *State v. Hoy*, 219 S.W.3d 796 (Mo. App SD 2007). However, as Mr. Jones testified, there has been no national or Missouri study done to determine whether or not a person with a BAC of .080 was "impaired." (Tr. 34-35, 37). The legislature's reduction of the "legal limit" from .1 to .08 was therefore not "rationally related" to any action that involved the operation of a motor vehicle. Additionally, §§302.500 and 302.700 et seq fail to provide for revocation of a pilot's license upon an alcohol related contact in a private vehicle and is therefore not "rationally related" to any alleged protection of the public from commercial driver's who "demonstrate a lack of judgment that could carryover to driving larger, more dangerous vehicles." (App. Br. 13). Additionally, someone convicted of "boating while intoxicated" under §306.111 RSMo. is not subject to having CDL revoked. As such, §§302.500 and 302.700 RSMo violate Bone's rights to due process equal protection as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and Article I, §§2 and 10 of the Missouri Constitution.

CONCLUSION

The Court should affirm the decision of the Circuit Court finding that §§302.500 and 302.700 RSMo. are unconstitutional as an improper exercise of federal power and that they violate Respondent's rights under due process and equal protection as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 2 and 10 of the Missouri Constitution.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I do hereby certify that the attached brief complies with Rule 84.06(b) and contains 3,906 words, excluding the cover, the table of contents, the table of authorities, this certification, the signature block, and appendix, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that the notice of this brief, along with an electronic copy of this brief, was sent through the Court's electronic filing system on this 25th of April, 2013 to:

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